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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

In the Matter of )  
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Amendment of Part 1 of the ) WT Docket No. 97-82  
Commission's Rules -- )  
Competitive Bidding Procedures )

To: The Commission

**COMMENTS IN SUPPORT OF PETITIONS FOR RECONSIDERATION**

The Interactive Video and Data Service ("IVDS") licensees listed below (collectively, the "In-Sync Entities"), pursuant to Section 1.429 of the Commission's Rules, hereby offer comments in support of the petition for reconsideration jointly filed by Loli, Inc., Cyberforce, L.L.C., Ividco, L.L.C., M&B XXXIX, Inc., Southern Wave, L.L.C., Star Interactive Video, Inc., Texas Interactive Network, Inc., and Trans Pacific Interactive, Inc. (collectively, "Petitioners") and the petition for reconsideration filed by Community Teleplay, Inc. ("CTI"). Each of these petitions seeks reconsideration of rules promulgated in the Commission's Third Report and Order in WT Docket No. 97-82<sup>1</sup> that take away the ability of IVDS licensees such as the In-Sync Entities to submit requests for grace periods to postpone making installment payments on their IVDS licenses.

Essentially, both Petitioners and CTI provide ample evidence to support preservation of the current rules that allow IVDS licensees to make successive grace period requests. Both petitioners convincingly state that failure to preserve these rules will result in defaults by many

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<sup>1</sup> In the Matter of Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, WT Docket No. 97-82, Third Report and Order, FCC 97-413 (released December 31, 1997)(hereafter "Third Report and Order").

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IVDS licensees. They both correctly argue that the rules were improperly promulgated and enforcement of them should be suspended indefinitely.

#### **I. Interest Of In-Sync**

The In-Sync Entities hold 19 licenses to construct and operate IVDS stations in the United States. All of these licenses were obtained via an FCC auction. Each In-Sync Entity has taken advantage of the FCC's installment payment process (set forth in former Section 1.2110(e)(4) of the Rules) that allows auction winners that have made timely down payments to pay the remainder of their winning bid amounts in installments. The In-Sync Entities timely submitted two post-auction down payment amounts, which accounted for twenty percent of the total amount due. Since then, the In-Sync Entities have made additional payments totalling more than \$270,000. However, due to financial hardship, the In-Sync Entities have been unable to make subsequent payments, and thus each timely has filed "grace period requests" of several installment deadlines that enable each to defer payment without being declared in default. To date, the staff has not ruled on any of the In-Sync Entities' requests.

As IVDS licensees, the In-Sync Entities are profoundly impacted by the new rules. These rules strip from IVDS licensees the right to file grace period requests. Instead, licensees that fail to make an installment payment 90 days after it is due will automatically be given an additional 90 days to make payment.<sup>2</sup> If payment is not made by the end of the second 90 day period, the IVDS licensee is declared in default and its license is automatically cancelled. In addition,

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<sup>2</sup> Such licensees also are required to pay late fees of 5 percent of the amount due if payment is made during the first 90 day period, and an additional 10 percent of the amount due if payment is made during the second 90 day period.

licensees such as the In-Sync Entities will have ten days from the date that the FCC staff rules on their pending requests to submit payment in full. Thus, the In-Sync Entities are faced with the prospect of either paying substantial amounts of money in the near future or risk losing their licenses (and their substantial investments in these licenses) altogether.

## **II. The Petitions**

Both CTI and Petitioners claim that the new rules were illegally promulgated. Petitioners argue that the Commission has engaged in arbitrary and capricious rulemaking, in violation of Section 706(2)(A) of the Administrative Procedure Act ("APA") (5 U.S.C. § 706), by failing to accord IVDS licensees with the same remedies as those accorded to other installment payors, particularly C Block PCS licensees. CTI argues that the Commission has engaged in impermissible retroactive rulemaking when it unilaterally changed the term of the agreement it had with each IVDS licensee regarding payment, default and grace period requests. Both petitions correctly state that IVDS is a special case that, at a minimum, deserves an exemption from the new rules governing grace periods.

### **A. Comments On Petitioners' Petition**

As Petitioners point out, the IVDS industry faces unique difficulties. See Petition at 6. There are almost no licensed IVDS facilities providing commercial service in the U.S. today. This is due in large part to the fact that equipment for IVDS facilities has only recently become available for market deployment. Many licensees such as the In-Sync Entities are only beginning to negotiate contracts to purchase this equipment. As a result, the In-Sync Entities, which obtained their licenses in 1994, have lost three and a half years of potential construction and operation time while they waited for the equipment to be available.

With no equipment available, essentially no stations have been constructed, and thus no revenues have been generated from any IVDS license. No revenues mean no funds from which to make installment payments. Accordingly, most IVDS licensees, including the In-Sync Entities, have taken advantage of the FCC's rules allowing for successive grace period requests.

The In-Sync Entities have filed these requests not to indefinitely delay payment obligations. The In-Sync Entities realize that the FCC has an obligation to the U.S. Treasury to collect past due sums. But the purpose of allowing installment payments was to allow small businesses such as the In-Sync Entities to be able to develop their business without being immediately burdened with overwhelming debt. This purpose cannot be fulfilled if there is no equipment available to operate the business. In fact, the FCC itself has recognized that IVDS licensees should not be held to deadlines while the IVDS industry is still in a state of flux.<sup>3</sup>

In addition, Petitioners reference a Petition for Rulemaking, filed a year and a half ago, that seeks rule amendments to extend IVDS installment payments to ten-year terms and to re-amortize existing license debt.<sup>4</sup> The In-Sync Entities agree with Petitioners that "the fairest and most equitable resolution. . . would be to suspend all [installment] payments until the FCC issues an Order in response to the Petition for Rulemaking." Petitioners' Petition at 3.

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<sup>3</sup> Petitioners' Petition at 3. See Requests by Interactive Video and Data Service Auction Winners to Waive the January 18, 1998 and February 28, 1998 Construction Deadline, Order, DA 98-59, released January 14, 1998.

<sup>4</sup> See Petition For Rulemaking filed September 4, 1996, by Euphemia Banas, Trans Pacific Interactive, Inc., Wireless Interactive Return Path, L.L.C., New Wave Communications, L.L.C., Loli, Inc., Multimedia Computer Communication, Inc., Southeast Equities, Inc., Robert H. Steele, MAR Partnership, IVDS ON-Line partnership, A.B.R. Communications, Inc., IVIDCO, L.L.C., Vision TV, Dunbar TV, Corp., and Legacy TV, Inc. See Also Letter Amendment to Petition for Rulemaking, filed January 28, 1997.

In the Third Report and Order, the Commission stated that the FCC is required under the Debt Collection Improvement Act ("Act")<sup>5</sup> to commence debt collection procedures within 180 days of the date of the obligation's maturity. Third Report and Order, par. 67. Implicit in this statement is the suggestion that the Commission cannot seek an extension of payment deadlines. This is not true. The Act expressly allows the FCC to file a request with the Secretary of the Treasury to exempt certain classes of the debt from the requirements of the Act. See 37 U.S.C. § 3711(h)(2)(B). Thus, the FCC could seek approval from the Treasury Secretary to exempt IVDS installment payments from the Act's requirements. This is a step that the Commission can and should take.

In addition, the In-Sync Entities agree with and support Petitioners' argument that the failure to accord IVDS licensees the same favorable regulatory treatment as that accorded C Block PCS licensees is arbitrary and capricious. See Petitioners' Petition at 4-6. As Petitioners state, in lieu of adhering to an installment payment plan, C Block PCS licensees have been granted a range of options that assist such licensees in avoiding default.<sup>6</sup> IVDS licensees need this type of relief as much as, if not more than, C Block PCS licensees because, unlike the PCS industry, the

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<sup>5</sup> Pub. L. No. 104-134, § 3100(j)(1), 110 Stat. 1321 (1996), codified at 31 U.S.C. § 3711(a), et seq.

<sup>6</sup> These options include: (1) disaggregation of one-half of a C Block PCS licensee's spectrum in return for forgiveness of fifty percent of the licensee's outstanding debt; (2) total amnesty, whereby a C Block PCS licensee may surrender all of its licenses, and in return will have all of its outstanding debt forgiven; (3) prepayment of debt, whereby a C Block licensee may use an amount equal to 70 percent of its total down payments for licenses it wishes to surrender as a credit toward the prepayment of any of its other licenses, at face value of their original Installment Payment Plan note.

IVDS industry is still not operational. It is unfair to make IVDS licensees subject to the new installment payment rules when such licensees do not have the same payment suspension and exit strategy options as C Block PCS licensees.

**B. Comments on CTI Petition**

The thrust of CTI's petition is that in amending the grace period rules, the FCC has engaged in illegal retroactive rulemaking. CTI correctly argues that IVDS licensees entered into a financial "agreement" with the FCC when they received their FCC licenses in exchange for their promises to make installment payments. See CTI Petition at 7. The grace period rules in effect at the time the agreement was reached set forth all rights and obligations of the parties to the agreement. By changing the rights and obligations, the FCC has promulgated rules that unilaterally change the terms of the agreement. As CTI points out, this constitutes retroactive rulemaking, which is prohibited by the APA.<sup>7</sup>

Without restating all of the points raised by CTI, the In-Sync Entities agree with and support CTI's argument. Like CTI, the In-Sync Entities have relied on the fact that the rules permitted successive grace period requests, much as any party to a contract relies on the terms and obligations in existence at the time a contract is written. Now these rules have changed, and successive requests are forbidden.

To unilaterally change these rules works an extreme hardship on the In-Sync Entities, as well as on all IVDS licensees that are making installment payments. The In-Sync Entities'

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<sup>7</sup> 5 U.S.C. § 551(4) (1994); Georgetown University Hosp. v. Bowen, 821 F.2d 750, 757 (D.C. Cir. 1987) aff'd sub nom. 488 U.S. 204, 208-09 (1988); Chadmoore Comm., Inc. v. FCC, 113 F.3d 235, 240 (D.C. Cir. 1997)(quoting Bowen, 821 F.2d at 757).

incentive in seeking to become IVDS licensees was the understanding that they would be able to pay for their licenses out of operating revenues. The new rules will not allow this to happen. Instead, the In-Sync Entities will have to scramble to locate other sources of funds to satisfy their installment payment requirements. This is not only unfair, it is also illegal.

#### **IV. The Rules Should Be Clarified Regarding Accountable Affiliates**

The fact that many licensees will default as a result of the elimination of successive grace period requests raises another issue. The Third Report and Order states that in the event of default, the "FCC will initiate debt collection procedures against the licensee and accountable affiliates." Id., par. 122. The question, then, is which entities meet the definition of "accountable affiliates?" In many cases, an installment payment licensee has filed an application for authority to assign or transfer control of the license to a third party. Once that application is granted, the third party becomes the licensee of record, even where the transaction has not yet closed or does not close. During the period where the FCC has deemed the assignee or transferee the licensee of record but a formal consummation has not taken place, the FCC could be initiating debt collection against the wrong party, under the theory, perhaps, that it is an "accountable affiliate."


Accordingly, the rules should be clarified to state that all installment payment debt is assumed by the assignee or transferee of a license for which an installment payment is due as of the closing date, and that the assignor or transferee is released from the debt as of that date. Under this clarification, the assignee or transferee will not be responsible for licensee debt unless and until the underlying transaction is consummated. Such a result also would add certainty to the contractual rights of the parties regarding installment payments due prior to closing.

## CONCLUSION

For the foregoing reasons, the In-Sync Entities support the Petitions for Reconsideration filed by Petitioners and CTI, and endorse the specific requests made by each petition that the FCC suspend enforcement of the new grace period rules against IVDS licensees.

Respectfully submitted,

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In-Sync Interactive/Duluth, Inc.  
In-Sync Interactive/Ft. Collins, Inc.  
In-Sync Interactive/Honolulu, Inc.  
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In-Sync Interactive/Roanoke, Inc.  
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## CERTIFICATE OF SERVICE

I, LaJuan A. Simmons, a Legal Secretary with the law firm of Rini, Coran & Lancellotta, P.C., hereby certify that on this 13th day of March, 1998, a copy of the attached document has been served upon the following:

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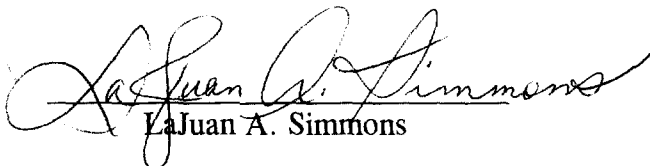
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